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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 1210

KIYOICHI FUJIKAWA, ROBERT K. MURAKAMI, MASAJI MARUMOTO, TASUKU KOMEYA, HAYAMI HASEGAWA, SHOICHI KAWASAKI, KAZUE MINAMI, MASAO UNO, HISAJI ONO-UYE and KANJI MAYEDA, minority stockholders of Pacific Bank,

Petitioners,

vs.

THE SUNRISE SODA WATER WORKS COMPANY, and KARL W. GREENE, RICHARD D. WELSH and WILFRED J. SERPAS, Trustees upon Dissolution of Pacific Bank, Inc., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

MEMORANDUM FOR RESPONDENTS.

QUESTION PRESENTED.

The question chiefly dealt with by the petitioners in their brief concerns the right of depositors and creditors of the Pacific Bank (owned for the most part by

Japanese in the Territory of Hawaii), to receive interest on their accounts from the date when the bank was closed, December 7, 1941, to October 27, 1942, the officers and directors of the bank, which was in sound financial condition, having neglected to apply for and secure the appropriate license from the Treasury Department to permit limited reopening and the payment of depositors and creditors.

The general rule that where assets of a bank in liquidation are sufficient to meet all claims and leave a surplus, interest on claims at the legal rate should be allowed from date of suspension to date of payment, is applicable in the case at bar as noted in the opinion of the Circuit Court. (R. 658-659.) Petitioners in their brief do not refer to this rule, though it obviously is of controlling importance.

Silesian-American Corp. v. Markham, 156 Fed. (2d) 793, and *Uebersee-Finanz Korp. v. Markham,* 158 Fed. (2d) 313, which counsel relies on for review as showing a conflict in decisions of the lower Court, are not in point, and those decisions are in no way applicable to this case.

DISCUSSION.

This review is sought by the stockholders holding approximately 7% of the outstanding stock of the Pacific Bank. (R. 8.) The Attorney General of the United States, as successor to the Alien Property Custodian, who holds 71.95% of the outstanding shares of said bank, has not joined in this petition. The Pacific Bank, organized under the laws of the Territory of Hawaii, conducted its business solely in the

Territory. (R. 145.) Approximately 72% of the stock of the bank was owned by Japanese nationals. (R. 58.) The executive committee and all officers were Japanese nationals. Eight of the nine directors and 60% of the depositors were nationals of Japan. (R. 91, 167-169.)

Under authority of Section 5(b) of the Trading With the Enemy Act, the President, on April 10, 1940, issued an Executive Order forbidding transactions with or by designated foreign nationals unless licensed by the Secretary of the Treasury. The Pacific Bank was so licensed, but on December 7, 1941, with the outbreak of war, its license was revoked and the Treasury Department, through its Foreign Funds Control Division, closed the bank. This was also the case with other financial institutions owned by Japanese nationals of the Territory. (R. 143, 353, 370, 509, 510.) The Treasury Department, however, contemplated they should reopen under new licenses and provided Application Form TFE-1 as a basis for issuing said licenses. (R. 373.)

Financial institutions in the Territory owned and controlled by Japanese nationals, *with the exception of the Pacific Bank,* availed themselves of this opportunity and applied for and obtained new licenses. (R. 351, 355, 370-373.) The Pacific Bank, having made no such application, remained closed until February 22, 1942, when the Governor of the Territory, exercising powers delegated to him under the Trading With the Enemy Act, as amended by the First War Powers Act of 1941, appointed Roger E. Brooks as receiver and liquidator of the bank. (R. 138.) In due course the

bank was liquidated. During the period of liquidation, interest collected on loans and bonds, including profits from the sale of securities, amounted to $97,916.32. (R. 546.) The trial Court held that the directors and officers of the Pacific Bank had neglected to do anything to get government permission, as the other Japanese owned financial institutions had, to operate, at least in a limited way, and thus relieve their depositors and creditors from damage and loss caused by the original freeze order. (R. 96-97.) The Court concluded:

> "From the evidence it now appears quite certain that the bank (the stockholders) neglected and failed in the duty that was impressed upon it by the situation to search avenues for obtaining some form of relief from its frozen state."

The contention of petitioners that Section 5 (b) (2) First War Powers Act of 1941, Sec. 301, 50 U.S.C.A. App. may be evoked by them is insupportable for the reason that this section is designed to relieve from personal liability persons performing duties under the act. In the case at bar, the proceeding is to secure interest from a thoroughly solvent bank by way of fair compensation for the depositors and creditors who were needlessly deprived of the use of their money because of the negligence of the officers and directors of the bank. The trial Court expressed the situation in these words:

> "In the face of this opportunity available to the directors and management of the Pacific Bank, a perfectly solvent bank, to go forward and at least try to obtain a ruling which would result in some form of relief, in whole or in part, to its depos-

itors and creditors, there is not a scintilla of evidence that it or any of its officers did anything, and such absence of evidence makes it appear conclusive that it did nothing whatever, in an effort to aid its creditors or its stockholders, but simply drifted along in inattention—perhaps in despair." (R. 97.)

The Circuit Court reached the same conclusion. Both Courts held the defense of impossibility of performance was not tenable and that the existence of a state of war under the circumstances here presented does not justify denial of interest to depositors and creditors who had lost the use of their money, through the negligence of the bank's management.

Unless clear error is shown, this Court accepts findings in which two Courts concur. *Pick Manufacturing Co. v. General Motors Corp.,* 81 L. Ed. 4, 5, 7, 57 Sup. Ct. 1, 299 U. S. 3; *Yuma County Water Users' Association v. Schlecht,* 67 L. Ed. 909, 43 Sup. Ct. 498, 262 U. S. 138.

It is respectfully submitted that the petition should be denied.

Dated, Honolulu, Hawaii,
May 7, 1947.

Respectfully submitted,
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SHIRO KASHIWA,
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